COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

DONALD & GLENN CHANDLER v. COMMISSIONER OF REVENUE

Docket No. C322376

Promulgated:
June 22, 2017

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, §39, from the refusal of the Commissioner of Revenue ("appellee" or "Commissioner"), to abate sales tax, along with related interest and penalties, assessed against the appellants, Donald and Glenn Chandler ("appellants" or "Mr. and Mrs. Chandler"), on their purchase in Massachusetts of a motor home in September of 2005.

Commissioner Good heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose, and Chmielinski joined her in the decision for the appellee.

These findings of fact and report are made pursuant to requests by both the appellants and appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

Michael P. Mack, Esq. for the appellants.

Joseph J. Tierney, Esq. *and Benson V. Solivan*, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of all of the evidence, including testimony and documents offered at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

This appeal pertains to the liability of the appellants for sales tax on the purchase in Massachusetts of a motor home. On January 19, 2012, the Commissioner issued to the appellants a Notice of Assessment of additional sales/use tax in the total amount of $5,756, plus statutory additions, for the tax period ending September 30, 2005 ("period at issue"). On February 29, 2012, the appellants filed an abatement application for the period at issue, which the Commissioner denied by Notice of Abatement Determination dated February 8, 2014. On April 9, 2014, the appellants seasonably filed a Petition Under Formal Procedure with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction over the instant appeal.

The appellants presented their case-in-chief through the testimony of the appellants, Glenn Chandler ("Mrs. Chandler") and Donald Chandler ("Mr. Chandler"), as well as the submission of photographs.

The appellants, who were Massachusetts residents on the date of the purchase of the motor home, retired from their respective employments during 2005. The appellants wished to spend their retirement traveling and believed that a motor home would provide them the freedom to travel without the burdens of packing or staying in hotels.

Mr. Chandler testified that, as Mrs. Chandler was preparing to retire, he began to research various options for a purchase of a motor home. He testified that by reading books and speaking with motor home owners at campgrounds, he learned about the formation of Limited Liability Companies ("LLCs") under Montana law for the purpose of purchasing a motor home.

Mrs. Chandler testified that the appellants' reasons for forming a Montana LLC to purchase the motor home included governance under Montana law, which did not require annual inspections of motor homes, thus giving the appellants the freedom not to have to travel back to Massachusetts for an inspection, as well as discounts on insurance for so-called "full-timers" who lived full time in their motor homes. She also noted that the LLC provided the appellants with limited personal liability in case of accidents. Mr. Chandler conceded, however, that tax savings was a factor in the formation of a Montana LLC,

voicing the appellants' belief that a purchase of a motor vehicle by a Montana LLC would not be subject to Massachusetts sales or use tax.

Mr. Chandler testified that he spoke with someone in the office of the Montana Attorney General, who referred him to an individual who was in the business of forming Montana LLCs for the purpose of purchasing motor homes. The appellants employed this individual, doing business as Montana Corporate Services, to establish the Glenn and Don LLC ("GAD LLC"). The articles of organization for GAD LLC were filed with the Secretary of State of Montana on August 11, 2005. The appellants were the only listed members of GAD LLC.

During its existence, the only activity in which GAD LLC engaged was the purchase of the motor home at issue in this appeal. GAD LLC did not maintain any checking, savings, or investment accounts; it did not arrange for any lines of credit; it never employed any individuals; it never generated any income; and it was never engaged in any trade or business activities.

The appellants sold their primary residence in Brockton on August 8, 2005. On August 10, 2005, the motor home at issue was purchased for $115,125 from Marty's USRV, a recreational-vehicle retailer located in Berkley,

Massachusetts and a registered vendor for Massachusetts sales tax purposes. Neither the appellants nor GAD LLC filed a sales/use tax return with, or paid any sales or use tax to, any jurisdiction including Massachusetts on the purchase of the motor home.

There were several indications that the appellants individually, not GAD LLC, were the true purchasers of the motor home. Although the Motor Vehicle Purchase Agreement names GAD LLC as the purchaser of the motor home, both appellants signed the agreement, with Mr. Chandler as the listed "purchaser" and Mrs. Chandler as the listed "co-purchaser." The purchase at issue was financed with a $98,000 loan from Seacoast Marine Finance ("Seacoast"). While the loan document named the appellants, "Members of a Montana LLC," as borrowers, the appellants' personal financial statements, not the financial statements of GAD LLC, were used to secure the loan from Seacoast, and the monthly premium payments on the loan were paid from the appellants' personal credit card. In addition to the $98,000 loan, the purchase was financed by means of a $17,125 check from the appellants' personal checking account. The motor home's insurance policy with Garden City Insurance listed Mr. Chandler individually as the insured.

The appellants initially took possession of the motor home from USRV in Berkley on September 28, 2005. However, almost immediately thereafter, the motor home needed several structural and mechanical repairs. The appellants stayed with Mrs. Chandler's sister in New Hampshire while USRV performed the repairs in Berkley. On its work orders for those repairs, USRV listed the appellants or Mr. Chandler individually as the customer. On November 7, 2005, the appellants again took possession of the motor home in Berkley.

The appellants picked up their motor home, finalized their packing, and on November 9, 2005 they departed Massachusetts and continuously traveled from that point. Additional repairs to the motor home continued to be necessary, and were performed by another service provider on November 18, 2005. This repair invoice, again, listed Mr. Chandler individually, not GAD LLC, as the customer. Then on December 6, 2005, a towing service was engaged to assist the motor home in Florida, and again, the invoice listed Mr. Chandler individually as the customer. The appellants maintained that they used the motor home as their primary residence until sometime in 2011 when they could no longer afford the payments and instead settled into a home in a retirement community in Florida.

The Commissioner contended that the sale of the motor home was a taxable transaction, subject to Massachusetts sales tax. The Commissioner assessed the appellants individually, not the now-defunct GAD LLC, for the sales tax due, together with interest and penalties. The Commissioner supported this assessment by maintaining that the creation of the Montana LLC was a sham, created purely to purchase the motor home in an attempt to avoid sales tax on the transaction.

The Commissioner presented his case-in-chief through the testimony of Brian Sullivan, a tax examiner with the Department of Revenue ("DOR") who, during the time of the tax examination of the appellants, was working for the filing enforcement bureau ("Bureau").

Mr. Sullivan testified that, during his tenure with the Bureau, the Office of the Inspector General of the Commonwealth ("OIG") referred to DOR numerous cases involving Massachusetts residents who had formed a Montana LLC and used the entity to purchase a recreational vehicle or a motor home. The OIG had determined that the Montana LLCs were sham entities used for the purpose of avoiding sales tax. Mr. Sullivan testified that he personally worked on approximately thirty of these cases, which he referred to as "the Montana situation." Through his

investigations, Mr. Sullivan noted several common features among the various Montana LLCs used by taxpayers:

> Invariably they had no federal tax number. They had no activity, no business activity. They had no employees, no income, no debts. It was just nothing. With one exception, the asset being the motor home that was purchased.

Mr. Sullivan testified that the appellants' case was one of many that had been sent to the DOR from the OIG as involving a suspected sham transaction. Through the course of his investigation of the transaction at issue, Mr. Sullivan verified that the transfer of title to and possession of the motor home had occurred at USRV in Massachusetts. He explained that, according to Massachusetts tax law, the sales tax is a "transactional tax," meaning that it is based upon where the sale occurred. Therefore, whether the purchaser was a Massachusetts resident or a Montana LLC, or whether the motor home remained in Massachusetts or was driven elsewhere are not relevant factors for the incidence of the tax; if title and possession of the motor home passed from the Massachusetts vendor to a purchaser in Massachusetts, the transaction is subject to Massachusetts sales tax.

Mr. Sullivan further testified that the Bureau examined the legitimacy of GAD LLC and in the course of the review, the Bureau determined that GAD LLC shared all of

the common sham-transaction characteristics -- it had no employees, no income or debts, it conducted no business other than the purchase of the motor home, and it did not own any assets other than the motor home. Mr. Sullivan testified, "[T]here was nothing there except the name." The Bureau thus determined that the use of GAD LLC to purchase the motor home was a sham, and accordingly, that the appellants were the purchasers of the motor home and liable for the sales tax on the transaction.

On the basis of these facts, the Board found that title to and possession of the motor home passed in Massachusetts. As will be further explained in the Opinion, the appellants presented no exemption to the sales tax that applied to the sale of the motor home. Therefore, the Board found and ruled that the transaction at issue constituted a taxable transaction that was subject to the Massachusetts sales tax.

The Board further found that the conveyance of the motor home to the GAD LLC was a sham. GAD LLC had no assets, debts, employees, activities, or ostensible purpose other than to acquire the motor home. Moreover, the appellants treated the motor home as if it were their own; they paid for its acquisition, insurance and repairs, and they insured it in the name of Mr. Chandler. Accordingly,

the Board found and ruled that the ostensible transfer of title to the motor home to GAD LLC had no economic substance and that the appellants were the "purchasers" of the motor home subject to sales tax under G.L. c. 64H, § 2.

Finally, the Board found and ruled that consulting the office of the Montana Attorney General regarding the Massachusetts tax consequences of their purchase of the motor home did not constitute reasonable cause for the failure to pay the sales tax at issue. There was no showing that the appellants engaged a Massachusetts tax expert for tax advice and apprised that expert in good faith as to all material facts specific to their situation. Therefore, the Board found that the appellants' failure to file a sales tax return and pay sales tax was not due to reasonable cause. The Board thus found and ruled that the Commissioner properly denied a waiver of penalties under the facts of this appeal.

Accordingly, the Board issued a decision for the appellee in this appeal.

OPINION

The principal question raised on appeal is whether the Commissioner properly assessed to the appellants Massachusetts sales tax on the purchase of the motor home.

The Board must determine, first, whether a sales tax was due on the transaction, and second, whether the Commissioner properly assessed the appellants in their individual capacity.

The sales tax is imposed "upon sales at retail." G.L. c. 64H, § 2. With respect to a sale of a motor vehicle, trailer, or other vehicle by a Massachusetts dealer, the sales tax "shall be paid by the purchaser [directly] to the registrar of motor vehicles" and not collected by the vendor. G.L. c. 64H, § 3(c); *see also* 830 CMR § 64H.25.1. For Massachusetts sales tax purposes, recreational vehicles and motor homes are included within the definition of motor vehicles as they are "motorized, self-propelled vehicle[s] which [are] constructed and designed for transportation or travel over a land surface." 830 CMR 64H.24.1(2); *see also* G.L. c. 90B, § 20.

By its statutory definition, a "sale" takes place on the "transfer of title or possession, or both" of tangible personal property for consideration. G.L. c. 64H, § 1 (definition of "sale"). The Board found that both title to and possession of the motor home passed, on November 7, 2005, in Berkley. The appellants point to no exception in G.L. c. 64H, § 6 or elsewhere that would apply to exempt the transfer of the motor home from the sales tax.

Therefore, the Board found and ruled that sales tax was due on the sale of the motor home.

The Commissioner assessed the sales tax in this appeal to the appellants individually, as GAD LLC was defunct as of the date of assessment. The Commissioner supported his assessment by contending that the sale to GAD LLC was merely a "sham transaction" to shield the appellants from tax liability. G.L. c. 62C, § 3A allows the Commissioner "'to disregard, for taxing purposes, transactions that have no economic substance or business purpose other than tax avoidance.'" ***Sherwin-Williams Company v. Commissioner of Revenue***, 438 Mass. 71, 79 (2002) (quoting ***Syms Corporation v. Commissioner of Revenue***, 436 Mass. 505, 509-10 (2002)). The sham transaction doctrine "generally 'works to prevent taxpayers from claiming the tax benefits of transactions that, although within the language of the tax code, are not the type of transactions the law intended to favor with the benefit.'" ***Sherwin-Williams Company***, 438 Mass. at 80 (quoting ***Syms Corp.***, 436 Mass. at 510); *see also* ***MASSPCSCO v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2010-372, 438, *aff'd*, ***MASSPCSCO v. Assessors of Woburn***, 80 Mass. App. Ct. 398 (2011). Moreover, while tax reduction can be a legitimate goal for certain business models, the courts will scrutinize those transactions

"'where the facts show that the form of the transaction is artificial and is entered into for the sole purpose of tax avoidance and there is no independent purpose for the transaction.'" ***The TJX Companies, Inc. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2007-790, 844 (quoting ***Falcone v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1996-727, 734-35), *aff'd*, Memorandum and Order Under Rule 1:28 (April 3, 2009).

In ***General Mills, Inc. v. Commissioner of Revenue***, 440 Mass. 154 (2003), the Supreme Judicial Court affirmed the Board's application of the sham transaction doctrine, as well as the step transaction doctrine, to deny favorable tax consequences to a sale transaction that, like the transaction at issue, involved the creation of a new entity. In that case, the Court held that the new subsidiary, which was created solely to receive a transfer of the parent company's trademarks in an attempt to avoid a taxable dividend in Massachusetts, was "merely a conduit through which the legitimate transactional route passed, and its involvement was properly compressed into a single sale of the [company's] intangibles directly to [the ultimate purchaser]." ***Id.*** at 172. *See also* ***Seaport II, LLC v. Commissioner of Revenue***, Mass ATB Findings of Fact and Reports, 2015-498, 518 (Board rejected as a sham

transaction designed to avoid deed excise tax the taxpayer's use of a designee to take title to property).

Similarly in the instant appeal, the appellants created a new entity, GAD LLC, to purchase the motor home in an attempt to avoid Massachusetts sales tax on that sale, as conceded by Mr. Chandler. Tax motivation is significant where a business reorganization or transaction results in a "'bald and mischievous fiction'" lacking economic substance. ***Sherwin-Williams***, 438 Mass. at 89 (quoting ***Moline Properties, Inc. v. Commissioner***, 319 U.S. 436, 439 (1943)).

In the instant appeal, GAD LLC had no employees, conducted no business other than its one-time purchase of the motor home, and owned no assets other than the motor home at issue. GAD LLC was a mere shell organization with no economic substance. Further, while the appellants claimed other non-tax motives for the formation of their LLC, including limited liability and eschewing the Massachusetts annual inspection requirement, these non-tax reasons do not explain the appellants' choice to form and use a Montana LLC. Freedom from annual inspections and "full-timers" insurance discounts are not benefits inherent in an LLC formation. Because "tax avoidance was the clear motivating factor and its only business purpose" and the

sale of the motor home to GAD LLC "had no practical economic effect on [the appellants] other than the creation of tax benefits," the Board found and ruled that the sale of the motor home to GAD LLC was a sham transaction that must be ignored. ***General Mills,*** 440 Mass. at 172. Accordingly, the Board found and ruled that the Commissioner properly assessed the appellants directly for the sales tax liability at issue.

The Commissioner further assessed late file and late pay penalties against the appellants pursuant to his authority found in G.L. c. 62C, §§ 33(a) and (b), which provide that:

> (a) If any return is not filed with the commissioner on or before its due date or within any extension of time granted by him, ***there shall be added*** to and become a part of the tax, as an additional tax, ***a penalty*** of one per cent of the amount required to be shown as the tax on such return for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.
>
> (b) If any amount of tax is not paid to the commissioner on or before the date prescribed for payment of such tax, determined with regard to any extension of time for payment, ***there shall be added*** to the amount shown as tax on such return ***a penalty*** of one-half of one per cent of the amount of such tax for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.

(emphasis added). As indicated from the language in bold print, the initial imposition of the penalties for late filing of a return and late payment of tax is mandatory. ***Fogarty v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1987-219, 222. The Commissioner has some discretion to abate this penalty, pursuant to G.L. c. 62C, § 33(f) ("§ 33(f)") but it is limited:

> If it is shown that any failure to file a return or to pay a tax in a timely manner is due to ***reasonable cause*** and not due to willful neglect, any penalty or addition to tax under this section may be waived by the commissioner, or if such penalty or addition to tax has been assessed, it may be abated by the commissioner, in whole or in part.

(emphasis added). *See also* ***Commissioner of Revenue v. Wells Yachts South, Inc.***, 406 Mass. 661, 663 (1990) (ruling that "[t]he only means of avoiding the penalty is found in subsection (f) of § 33").

Because the appellants bear the burden of proving their right to the abatement, they also bear the burden of establishing reasonable cause. ***Blakeley v. Commissioner of Revenue***, 28 Mass. App. Ct. 499, 501, *rev. denied*, 407 Mass. 1103 (1990); ***Q Holdings Corp. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1996-412, 419.

The Supreme Judicial Court defines "reasonable cause" in § 33(f) as establishing an "objective standard," whereby

"[a]t a minimum, the taxpayer must show that he exercised the degree of care that an ordinary taxpayer in his position would have exercised." ***Wells Yachts South***, 406 Mass. at 665. This objective standard requires a factual analysis to determine if the taxpayer exercised "ordinary business care" with respect to filing returns and paying taxes in a timely manner. ***Id.***

The Board has found reasonable cause to abate late file and late payment penalties in certain circumstances. For example, in ***Samia v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1993-127, 133, the Board specifically found that "the appellants made, or in good faith attempted to make, full disclosure of all relevant information to their tax attorney regarding the tax matter in issue, [] the appellants' tax attorney was a competent tax expert . . . [and] the tax attorney's advice was on the specific tax matter at issue." Therefore, the Board found that "the appellants reasonably relied upon their tax attorney's opinion in failing to timely file their Massachusetts nonresident personal income tax return and pay the tax," and accordingly ruled that "the appellants exercised ordinary business care and prudence." ***Id.*** *See also* ***Universal Instruments, Corp. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1998-407,

416-17 (finding reasonable cause where the taxpayer relied on the Director of the parent company's tax department, a certified public accountant and tax attorney, who in turn, in the absence of a DOR public written statement, had relied upon Public Law 86-272 and relevant Massachusetts tax cases in rendering his opinion); ***Q Holdings Corp.***, Mass. ATB Findings of Fact and Reports at 1996-420 (finding reasonable cause where the appellant relied upon the advice of "a nationally recognized certified public accounting firm doing substantial business in Massachusetts"). *But see* ***Estate of Margaret S. Henderson v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2005-601, 617-18 (finding no reasonable cause when the trustee of an estate, an attorney who was neither a state tax or inheritance tax expert, neglected to consult a tax expert or the Estate Tax Bureau to determine whether and when to file an inheritance tax return and pay the requisite tax).

In the instant appeal, Mr. Chandler testified that the appellants relied upon his independent research, which consisted of reading books and conversing with motor home owners at motor home parks, as well as a telephone conversation with the office of the Montana Attorney General regarding the tax consequences of forming a Montana LLC to purchase a motor home. The appellants failed to

provide any credible evidence that they consulted a Massachusetts tax expert or provided the expert with all the relevant information. Therefore, the Board found and ruled that the appellant did not exercise ordinary business care in failing to file returns and pay Massachusetts sales tax in a timely manner. Accordingly, the Board found that the Commissioner properly refused to abate penalties in this appeal.

Accordingly, the Board issued a decision for the appellee in the instant appeal.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy:

Attest: _____
Clerk of the Board
Asst.